(43)

No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RICHARD A. EPSTEIN, BRUCE ACKERMAN, RANDY E. BARNETT, AND GEOFFREY R. STONE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether the military commission established by the President to try Petitioner and others similarly situated for alleged war crimes is authorized by, or is instead inconsistent with, the Uniform Code of Military Justice.

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INTEREST OF *AMICUS CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amici* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting the parties' consent have been filed with the Clerk.

stitutional law for more than 30 years, is an editor of the prestigious *Supreme Court Review*, is co-author of one of the nation's leading casebooks in *Constitutional Law*, and most recently published *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (W. W. Norton 2004), which received the 2004 Los Angeles Times Book Award for History. He is currently the Chief Editor of a 15-volume series on *Inalienable Rights*, published by Oxford University Press.

The four law professors who have joined this brief differ among themselves on many issues but are united in their belief that our Constitution will serve as an enduring charter of government only if all branches of government act in accordance with its central principles. These include a respect for the rule of law, separation of powers, and the protection of all persons, citizens and aliens alike, and the insistence on known and settled rules to prevent arbitrary impositions of government power. The President's assertion of power in this case implicates all of these concerns.

SUMMARY OF ARGUMENT

The first question presented is whether the Military Order providing for the establishment of military commissions, 66 Fed. Reg. 57,833 (Nov. 13, 2001) ("Military Order"), is a lawful exercise of authority vested in the President under the Constitution and laws of the United States. The purpose of this brief is to explain that the Uniform Code of Military Justice ("UCMJ"), on which the President relied in adopting the Military Order, instead supports the conclusion that the President exceeded his authority.

I. There are compelling reasons for insisting on clear authorization for the establishment of military commissions in light of the surpassing importance of the constitutional interests at stake. The President asserts the unilateral authority to define offenses, to establish procedures for their prosecution and adjudication, and to impose punishment, all insulated from judicial review. Furthermore, the President has taken

these extraordinary steps to govern proceedings that will take place in United States territory, not just in an occupied territory abroad, and despite the absence of any need for unusual expedition. If such action can ever be found to comport with due process (a question the Court need not address), it must rest on the combined force of legislative and executive power, not on the basis of the unilateral action by the executive. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

II. In decreeing the creation of the military commissions, the President relied on (1) his constitutional authority as Commander in Chief; (2) the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) ("AUMF"); and (3) sections 821 and 836 of the UCMJ, 10 U.S.C. §§ 821, 836. *See* Military Order, 66 Fed. Reg. at 57,833. We focus on the third: the UCMJ does not provide any such authority. To the contrary, the UCMJ undercuts the President's claim of authority under the AUMF and the Constitution.

A. Section 821 of the UCMJ does not confer any authority to establish military commissions, but is merely a savings clause, preserving the jurisdiction of military commissions "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. The extension of military commission jurisdiction to Petitioner – who is being tried far from the field of battle or occupied territory and who is not charged with attempting to interfere with the military effort – is without precedent. Thus, there is no basis for arguing that section 821 reveals anything about congressional intent to authorize military commissions in this circumstance.

B. Section 836 affirmatively constrains the President's authority to establish procedures for military commissions that depart from those used in courts-martial authorized under other provisions of the UCMJ. Section 836(b) – which was adopted after this Court's decision in *In re Yamashita*, 327 U.S. 1 (1946) – requires the President to establish uniform

procedures for all military tribunals "insofar as practicable." 10 U.S.C. § 836(b). Far from adopting procedures for the military commissions that would mirror those established for courts-martial, and despite the absence of any finding that adoption of uniform procedures would be impracticable, the President has deliberately departed from those procedures, undermining the independence of the tribunals and giving rise to an appearance of fundamental unfairness. That departure violates the plain purpose underlying section 836(b), which is to ensure that all individuals who are subject to military justice are guaranteed, to the extent practicable, uniform procedures. Because the Military Order violates this principle, it can be upheld only if Congress is powerless to circumscribe any inherent power of the executive in this area. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Because the Constitution explicitly grants Congress the power to adopt rules governing the armed forces – which includes the power to regulate the administration of military justice – adoption of the Military Order in the face of the contrary command of Congress is unconstitutional.

ARGUMENT

I. BECAUSE OF THE VITAL CONSTITUTIONAL INTERESTS AT STAKE, THE COURT SHOULD DEMAND A CLEAR STATEMENT OF AUTHORITY TO JUSTIFY THE MILITARY ORDER

This Court's review of the constitutionality of the Military Order must begin with the stubborn fact that the Military Order concentrates in the hands of the executive all of the powers of government over those individuals within his physical control. No respect is paid to the careful separation of the executive and judicial branches built into the Constitution. Under the Military Order, the President claims the power to define offenses, to designate those subject to prosecution for them, to establish procedures for the tribunals, to judge the guilt or innocence of the accused, and to review any resulting conviction.

Under any circumstances, executive action that lacks explicit authorization in the Constitution or laws of the United States raises grave constitutional concerns. "The Constitution divides the National Government into three branches – Legislative, Executive and Judicial. This 'separation of powers' was . . . looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will." *United States v. Brown*, 381 U.S. 437, 442-43 (1965). "Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996).

The constitutional concerns raised by the Military Order are magnified by the additional constitutional interests that the Military Order impinges. The Fifth Amendment provides to every person the assurance that the government shall not take "life, liberty, or property" without due process of law. U.S. Const. Amend. V. The protections in question apply with equal force to citizens and non-citizens alike. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Truax v. Raich*, 239 U.S. 33, 39 (1915). The Due Process Clause does not say "nor shall any *citizen* be deprived of life, liberty, or property without due process of law." Rather, it expressly grants such rights to all *persons* without regard to citizenship. The need for equal procedural treatment is at its highest in the context of criminal prosecution, where the Constitution guarantees as well a right to grand jury presentment, a trial by jury, "with such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866); *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

The Military Order brushes aside these constitutional protections. In the place of grand jury presentment, there is the President's unilateral written statement that he has "reason to

believe" that a non-citizen "is or was a member of . . . al Qaida" and "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism," or "knowingly harbored" such individuals. Military Order § 2(a), 66 Fed. Reg. at 57,834. In the place of criminal offenses defined in advance by the legislature, there is the invocation of offenses defined by the executive. In the place of judges and impartial juries, the Military Order provides for trial before military commissions. And, in the place of confrontation of witnesses and compulsory process guaranteed "the accused" – alien as well as citizen (*see Wong Wing*, 163 U.S. at 238) – by the Sixth Amendment, the Military Order allows for hearsay testimony and, pursuant to later regulations adopted by the Secretary of Defense, the exclusion of the accused from his own trial. The Administration policy is the greater the alleged offense, the fewer the procedural protections, when, in the absence of emergency, only the opposite relationship comports with due process.

More fundamentally, the Military Order dispenses with basic procedural protections that are essential components of due process.[2] Above all, due process requires that a trial and its accompanying proceedings be governed by established and enforceable rules, known in advance by the accused. *See* John Locke, *Second Treatise of Government* Ch. IX, ¶¶ 124-125 (1690) (noting that in a state of nature "[t]here wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong," and "a known and indifferent judge, with authority to determine all differences according to the established law"); Lon L. Fuller, *The Morality of Law* 38-39 (rev. ed. 1969). That bed-

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[2] The government asserts that Petitioner has no due process rights because he is an alien "outside the sovereign territory of the United States." Br. for Resp. in Opp. at 19 n.11 (internal quotation marks omitted). That assertion is difficult to square with this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), that Guantanamo Bay is within "'the territorial jurisdiction' of the United States." *Id.* at 480 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

rock requirement of fair process is violated by the military commissions, which delegate to the Secretary of Defense the authority to make rules to govern the military commissions – rules that have repeatedly changed. *See* Pet'r Cert. Reply Br. at 4-5. Furthermore, the Military Order and the Secretary's regulations state that the rules adopted therein do not create any "enforceable" rights, Military Order § 7(c), 66 Fed. Reg. at 57,836; Military Order No. 1, § 10, 68 Fed. Reg. 39,374, 39,379 (July 1, 2003) (32 C.F.R. § 9.10), and that the Secretary's regulations are subject to change at any time, *see* Military Order No. 1, § 11, 68 Fed. Reg. at 39,379 (32 C.F.R. § 9.11). These jerry-built rules hardly meet the standard of "an established, settled, known law" on which our Constitution rests.

The military commissions would apply these abbreviated and inadequate procedures in prosecutions where the accused faces the possibility of life imprisonment or death and his interests are therefore of the highest order. *See* Military Order § 4(a), 66 Fed. Reg. at 57,834. As the plurality recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "the test that we articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), . . . dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Id.* at 529 (opinion of O'Connor, J.) (quoting *Mathews*, 424 U.S. at 335) (parallel citations omitted). The "private interests" here demand – absent an extraordinarily compelling justification – the most highly formalized and comprehensive procedural protections, not the slapdash and shifting procedures of the military commissions.[3]

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[3] As noted below, other than a statement noting the decision to suspend the ordinary rules of evidence, nothing in the Military Order or in the Secretary's adopting regulations even purports to justify the departures from ordinary procedures applicable to other military justice tribunals; the government offers no competing interest to weigh in the balance. Indeed, in

The significance of the constitutional interests at stake underscores the need for the Court to insist that Congress make a clear statement to justify the Military Order and the military commissions that the Order creates. As Justice Jackson noted, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Precisely because the executive action undertaken here would raise substantial constitutional questions under the Due Process Clause even if adopted by "the Federal Government as an undivided whole," *id.* at 636-37, the Court should not uphold the executive action in the absence of the clearest indication of congressional authorization.

This reasoning underlay the concurring opinion of four Justices, including the Chief Justice, in *Ex parte Milligan*. The concurring Justices noted that the trial of Milligan by military commission "had the fullest sanction of the executive department of the government." 71 U.S. (4 Wall.) at 132 (Chase, C.J., concurring in the judgment). But the Court then looked to the acts of Congress on which the executive had purported to rely, and determined that those statutes did not authorize the trial of civilians by military commission. Thus, the concurrence concluded that, even though "Congress had power . . . to authorize the military commission which was held in Indiana," it had "not exercised" that power. *Id.* at 137. In this circumstance, the issue became one of separation of powers: "neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President." *Id.* at 139. Thus, the President cannot, "without the sanction of

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light of *Hamdi*, so long as Petitioner is properly subject to military justice as an enemy combatant, the government can hold him in preventive detention, at least for some period of time. Thus, there is no immediate interest in protecting the public that could possibly be compromised by requiring more fixed and formalized procedures for his trial.

Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels." *Id.* at 139-40.

II. THE UCMJ UNDERMINES, RATHER THAN SUPPORTS, THE PRESIDENT'S CLAIM OF AUTHORITY TO ISSUE THE MILITARY ORDER

The President cited three sources of authority to issue the Military Order: the Commander-in-Chief Clause of Article II of the Constitution, the AUMF, and the UCMJ. We leave it to others to explain in detail what is evident from the text of the Constitution: that the President's "executive" power does not authorize him to establish tribunals to adjudicate the guilt or innocence of those accused of crimes. Article II, Section 2 of the Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." This provision establishes the principle of civilian control over the military by designating the President as head of the armed forces, but it does not confer any powers on the President. He shall *be* the Commander in Chief, in contrast to his *power* to make treaties or fill vacancies. In his role as Commander in Chief, the President is subject to control by Congress, which has "Power . . . To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 14.

Likewise, we do not address in detail the proper interpretation of the AUMF. It is undisputed that the AUMF is not a formal declaration of war, and, in all events, the terms of that statute lend no support to the claim that Congress intended to allow the President to circumvent traditional judicial safeguards under some unprecedented view of the war power. We nevertheless assume, favorably to the President, that the AUMF is the functional equivalent of other congressional authorizations of the use of force falling short of a formal declaration of war.

Even on that assumption, however, careful attention to the text and structure of the UCMJ – far from providing any indication that Congress intended to authorize the Military Order – makes clear that the President's actions are inconsistent with the will of Congress.

A. Section 821 of the UCMJ Is Merely a Savings Clause and Cannot Confer Authorization To Establish Military Commissions

Section 821 was originally added to the Articles of War in 1916. *See In re Yamashita*, 327 U.S. at 19-20. By its plain terms, section 821 does not confer any authority on the President to establish military commissions. Instead, section 821 was adopted to make clear that the UCMJ's jurisdictional grants to courts-martial did not eliminate "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821. Thus, the "sole function" of the clause is to "clarify" that the expansion of court-martial jurisdiction, by itself, does not restrict any prior grant of jurisdiction to military commissions. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 583 (2004). "The usual function of a saving clause is to preserve something from immediate interference – not to create." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920); *see also* S. Rep. No. 64-130, at 40 (1916) (predecessor of section 821 "just saves to these war courts the jurisdiction they now have") (testimony of Gen. Crowder).

Section 821 thus provides *no* evidence of any congressional intent to *expand* the jurisdictional reach of any military commissions. And, for three reasons, the jurisdictional reach of the military commissions presented in this case is unprecedented.

First, we can put to one side cases involving the establishment of military commissions as part of military government during military occupation. In *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court stated that, "[i]n the absence of at-

tempts by Congress to limit the President's power, it appears that, as Commander-in-Chief . . . , he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, *in territory occupied by Armed Forces of the United States*." *Id.* at 348 (emphasis added). There has been no military occupation in this case, and Petitioner is not being held and will not be tried in territory "occupied by the United States by force of arms." *Id.* Instead, solely in an effort to negate any constitutional rights that Petitioner might have under the Due Process Clause (which should nevertheless extend to Petitioner, as the Fifth Amendment applies to all persons and contains no territorial limitations), he has been whisked away to Guantanamo Bay – territory that the United States occupies pursuant to agreements with Cuba. *See Rasul*, 542 U.S. at 480.

Second, for related reasons, *In re Yamashita* provides no support for the establishment of military commissions to try Petitioner. The military commission in that case was established in a theater of a declared war, immediately following the conclusion of open hostilities, "before the formal state of war ha[d] ended." 327 U.S. at 12. The Court noted that the commission could be justified as being within the inherent power of the military commander "to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced." *Id.* Here, there has been no declaration of war and the military commissions have been established far from any theater of conflict in a location chosen by the United States for its sole advantage.

Third, *Ex parte Quirin*, 317 U.S. 1 (1942) – on which the government places its greatest reliance – is likewise clearly distinguishable from Petitioner's case. The Court there permitted the trial of the petitioners by military commission because "[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disci-

plinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war." *Id.* at 28-29 (emphasis added). Thus, the Nazi saboteurs in *Ex parte Quirin* – which was decided during an ongoing declared war – were charged with illegal actions intended to disrupt the military's conduct of the war itself. The Court noted:

> By a long course of practical administrative construction by its military authorities, our Government has . . . recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Id. at 35-36 (footnote omitted).

The charges against Petitioner cannot be forced within this framework. Petitioner is charged with conspiracy to commit the following offenses: "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." Pet. App. 65a. Petitioner is not charged with attempting to impede the United States military effort – which was authorized only weeks before allied Afghan forces turned Petitioner over to American forces – and he never (so far as the charging document reveals) even confronted United States forces.

Others will address the proper interpretation of these key precedents and the extent of executive authority they recognize. Our contention is that section 821 of the UCMJ contains no congressional endorsement for the establishment of military commissions to try individuals like Petitioner. The

evident distinctions between the use of military commissions in prior cases and their use in the instant case are too great to be ignored. As the plurality recognized in *Hamdi*, "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," precedents fashioned in the context of past wars provide little or no guidance to present problems. 542 U.S. at 521 (opinion of O'Connor, J.). Those precedents have been developed in the context of declared war, involving soldiers of an enemy state, and involving offenses that have been long understood to constitute violations of the laws of war. They reveal nothing about any asserted congressional authorization of military commissions in the present case, which does not involve a formally declared war, does not involve soldiers of an enemy state, and which applies the laws of war to cover conduct that is also prohibited under criminal statutes. Taken together, these palpable differences "suggest[] a weaker case of military necessity and much greater alignment with the traditional function" of the constitutional principles of both due process and separation of powers. *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment). Section 821 should be construed to avoid these pressing constitutional questions. *See Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (noting "the necessity to rest decision on the narrowest possible ground capable of deciding the case"); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

B. The Military Order Is Inconsistent with the Central Procedural Constraints Found in Section 836(b) Because the President Has Not Offered Any Findings To Explain Why It Is Appropriate To Waive the General Procedural Protections Applicable in Courts-Martial

Section 836 of the UCMJ cabins the President's discretion to adopt procedures to govern military tribunals in three ways. The first relates to the use of general rules of evidence. The second requires that these rules not be contrary to or in-

consistent with the general rules of "this chapter" (*i.e.*, the UCMJ). The third demands that, as far as practicable, all relevant rules and regulations shall be uniform. The current military rules violate section 836 in all three ways.

First, section 836(a) requires that the procedures adopted by the President, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836(a). The regulations governing courts-martial in the United States give effect to this requirement by, for example, adopting Military Rules of Evidence that closely track the Federal Rules of Evidence. By contrast, the Military Order in this case baldly announces that "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized" in district courts. Military Order § 1(f), 66 Fed. Reg. at 57,833. The Order adopts instead a much more relaxed standard, admitting any evidence that would "have probative value to a reasonable person." *Id.* § 4(c)(3), 66 Fed. Reg. at 57,835. But the Order offers no *findings* – let alone findings that are sufficiently concrete and detailed as to survive judicial review – as to why the safeguards provided by the general rules of evidence or the Military Rules of Evidence cannot be applied in this instance. That paucity of findings is especially troublesome because the Order identifies no exigent circumstances or resource constraints that block the use of standard rules that would obviate all the serious due process and separation of powers issues that the President's Order raises.

Second, section 836(a) provides that any regulations prescribed by the President "may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836(a). The rules established to govern the military commissions *are* "contrary to or inconsistent with" the UCMJ in several respects, as the district court recognized. *See* Pet. App. 38a-41a. Perhaps most fundamentally, Article 16 requires that every general court-martial consist of a military judge and no less than five mem-

bers. *See* 10 U.S.C. § 816 (12 in capital cases, *see id.* § 825a). In contrast, the military commission rules require only three members, and no military judge. Article 10 of the UCMJ requires a speedy trial, *id.* § 810; Article 13 places limits on the conditions of pre-trial detention, *id.* § 813; and Article 38 provides the accused certain rights before charges against him may be "referred" for trial, *id.* § 838 & note. In contrast, the military commission rules contain no referral process at all. Article 39(b) specifically guarantees that "[a]ll . . . proceedings" other than deliberation and voting "shall be made a part of the record and shall be in the presence of the accused," counsel, and the military judge. *Id.* § 839(b). In contrast, the rules of the military commissions permit the exclusion of the accused from trial. *See* 32 C.F.R. § 9.6(b)(3), (d)(5).

The court of appeals held that the UCMJ "takes care to distinguish between 'courts-martial' and 'military commissions.'" Pet. App. 14a. From that premise, it wrongly concluded that the Military Order and subsequent regulations are consistent with Article 36 so long as the President does not adopt rules that are "'contrary to or inconsistent with' the UCMJ's provisions governing military commissions." *Id.* Yet this argument misapprehends the logic of the UCMJ and renders meaningless section 836(a)'s guarantee. Many of the UCMJ's most pertinent Articles speak, not in terms of a specific tribunal, but more generally of the rights of the accused: for example, Article 10 applies to "[a]ny person subject to this chapter," *id.* § 810; Article 13 prohibits punishment of any "person, while being held for trial," *id.* § 813; Article 30 applies to all "[c]harges and specifications," *id.* § 830; and Article 31 applies to any "person subject to this chapter," *id.* § 831. The UCMJ procedures thus provide the baseline against which courts can judge the soundness of the alternative procedures that the President adopts for military commissions. The ultimate question is whether there are any circumstances that justify the relaxation of procedural protections in this case. The usual factors that might justify such a depar-

ture are not present here. The case does not arise in time of a formally declared war; it could easily be tried in the United States; no circumstances require exceptional haste[4]; and the offenses charged in the present indictment do not have any distinctive relationship to the United States' conduct of military activities.

Third, the court of appeals' ruling entirely ignores the third statutory constraint on the President's authority to establish rules for courts-martial: section 836(b) provides that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b). Even if certain Articles, by their terms, apply to courts-martial and not to military commissions, section 836(b) extends their reach to all military tribunals *unless* the President makes explicit, valid findings as to why the application of uniform procedures is not practicable. Yet neither the President in the Military Order nor the Secretary of Defense in adopting any of the additional regulations has attempted to justify any of the numerous departures from court-martial procedures.[5]

In light of that failure, the Court should enjoin use of the military commissions, at least until the executive branch adopts rules that guarantee to those tried before them all of the process that is guaranteed to defendants before courts-martial. Many departures from court-martial procedure could never be justified in light of the plain terms of section 836(b): there is no reason that those tried before military commissions should not have the benefit of a professional military

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[4] The government did not designate Petitioner for trial until December 2003, nearly two years after sending him to Guantanamo Bay; did not charge him until July 2004; and rejects his assertion that he is entitled to a speedy trial.

[5] The armed forces have recognized the need for uniform procedures in the Manual for Courts-Martial (2002 ed.), which provides that, "[s]ubject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions . . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." *Id.* at I-1.

judge, a panel of at least five officers, and a vote of at least three-quarters of the members before imposing a sentence of imprisonment of greater than five years. *See* 10 U.S.C. §§ 826, 852. More generally, any departure from the procedures guaranteed in courts-martial must be justified by specific presidential findings in light of the congressional requirement that procedures be uniform "insofar as practicable."

Holding that the UCMJ requires uniform procedures for all military tribunals does more than give effect to the plain language of section 836. It is also consistent with the history of the provision. As noted above, section 836(b) was adopted after the trial of General Yamashita.[6] *In re Yamashita* (which upheld his death sentence) had been roundly criticized by the dissenting Justices. They did not inveigh against all use of military commissions. But they did (among other objections) show grave misgivings as to whether the procedures under which General Yamashita was tried satisfied elementary principles of fundamental fairness and the rule of law. *See* 327 U.S. at 27 ("The failure of the military commission to obey the dictates of . . . due process . . . is apparent in this case.") (Murphy, J., dissenting); *id.* at 41-42 ("[I]t is never too early[] for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens,

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[6] The predecessor of section 836 – section 38 – did not apply to General Yamashita because he was not a person "defined by Article 2 as being subject to the Articles." 327 U.S. at 20. After the Court's decision, Congress expanded Article 2 to reach both "[p]risoners of war in custody of the armed forces" – a provision that would have applied to General Yamashita – and "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a)(9), (12).

alien enemies or enemy belligerents.") (Rutledge, J., dissenting).[7]

These evident due process concerns preceded the congressional requirement of uniform procedures so that even alien enemies receive the same procedural protections as are afforded American service personnel. That requirement is also consistent with the Due Process Clause, which applies to all persons, citizens and aliens alike. The uniform procedures, moreover, echo the age-old wisdom that the process due in any case is best achieved by using uniform rules that insulate military commissions from the taint of unfairness that the use of extraordinary procedures inevitably spawns. There is no reason to construe section 836 to authorize a latter-day Star Chamber. Once again, a sound construction of section 836 avoids raising the serious due process challenges that were so evident in *In re Yamashita*.

Furthermore, the requirement that courts-martial and military commissions employ common procedures reflects the accepted history of military commissions. These bodies were created not to evade the procedural protections afforded by courts-martial but to address cases falling outside of court-martial jurisdiction that were nevertheless subject to military justice under the laws of war. *See* David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2010 (2003). As General Crowder, the Judge Advocate General of the Army, testified on the adoption of the precursor of section 821, "[b]oth classes of courts" – that is, courts-martial and military commissions – "*have the same procedure*." S. Rep. No. 64-130, at 40 (emphasis added). Although President Roosevelt, with the Court's acquiescence, used military commissions with non-uniform procedures in limited circum-

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[7] By contrast, eight Justices joined in upholding the jurisdiction of the military commission in *Madsen v. Kinsella*, reassured that the system of military justice "subjected German and United States civilians to the same procedures and exhibited confidence in the fairness of those procedures." 343 U.S. at 359-60.

stances, Congress signaled its disapproval of such non-uniformity in the new section 836. It is no accident that, since the adoption of the UCMJ, the executive has not had a single occasion to create military commissions for the trial of any offense, even though the United States has been involved in bitter and often unconventional conflicts in Korea, Vietnam, Panama, Kuwait, and elsewhere.

In the UCMJ, Congress adopted a detailed structure to govern military justice, one that reflects modern constitutional requirements including those created under this Court's interpretation of the Due Process Clause. Section 836 of the UCMJ makes clear that Congress intended this structure to apply, insofar as practicable, to *all* persons who may be subject to military justice. In this case, the President has not offered any justification for the manifest departure from these uniform procedures.

When the executive skirts the uniform practices found in a known and established statutory framework, he takes action that is "incompatible with the expressed . . . will of Congress" and his power is thus "at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Such action can be upheld, therefore, only if Congress is "disabl[ed]" from acting on the subject. *Id.* But Congress was not disabled from acting. To the contrary, it enacted section 836 pursuant to Article I of the Constitution, which gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I., § 8, cl. 14. Because section 836 falls plainly within the power of Congress, it must be given its full effect.

Finally, by striking down the military commissions on this basis, the Court would respect the principle of deciding cases involving separation of powers narrowly. *See Dames & Moore*, 453 U.S. at 660. Many questions concerning presidential authority in the struggle against international terrorism – a struggle that has already claimed far too many innocent lives – will remain unanswered by such a decision. But this

nation will do little to win that battle by adopting procedures that are more worthy of our enemies than ourselves.

The entire war against terrorism tests our own legitimacy as a nation. And we shall meet that test only if we reaffirm our deep commitment to due process, to separation of powers, and, ultimately, to an unwavering conviction that the greatest strength of our nation lies in its ability to hold fast to the rule of law in times of stress and uncertainty. *See Ex parte Milligan*, 71 U.S. (4 Wall.) at 120-21. We have no complaint against any determined executive efforts to bring Petitioner to justice. But we voice strong complaint against the executive's effort to bring Petitioner to justice by going outside the known, established, and settled rules that Congress has adopted to vindicate those values. Congress has mandated fair and uniform procedures to govern all military tribunals. This Court should vindicate that vision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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